

## REMARKS

Claims 1-20 are now pending in the present application. Claims 1-11 have been allowed. No Claims have been amended, added, or canceled.

Applicant thanks the Examiner for allowing claims 1-11.

Applicant has carefully studied the outstanding Office Action. The present Response is intended to be fully responsive to all points of rejection raised by the Examiner and is believed to place the application in condition for allowance. Favorable reconsideration and allowance of this application are respectfully requested. No new matter has been added by any of the amendments to the specification. Applicant respectfully requests reconsideration and withdrawal of the Examiner's rejections in view of the foregoing amendments and following remarks.

## CLAIM REJECTIONS – 35 U.S.C. §103(a)

### Claims 12-20

The Examiner stated that claims 12-20 are rejected under 35 U.S.C. §103(a), as being unpatentable over Budd et al. (U.S. Patent No. 4,910,031) for reasons of record used in rejecting claims 1-20.

The reasons of record were as follows:

Budd discloses topped savory snack foods. At example III potato chips are coated with a binder used as an adhesive made of a liquid component and a dry component. The liquid component is sucrose, water, polysorbate and lactisole. The dry component is maltodextrin. Then the chips are topped with cheese, bacon and onion flakes and heat treated in an oven at 105C for 2 minutes. After cooling the product is vacuum treated to provide a snack food with a coating. Claim 1 appears to differ from Budd in the recitation of coating the seasoning bits with an adhesive and in the recitation of the particular extent of toppings used on the chip. It would have been obvious to one having ordinary skill in the art to coat the toppings of Budd with an adhesive in order to further increase the adhesion of the coatings to the potato chips. It is appreciated that the particular amount of coatings used on the chip is not disclosed in the reference but no unobvious or unexpected result is seen from the inclusion of more toppings on the chip of Budd to improve the nutritional value and overall flavor impact of the product.

Applicant would point out that Examiner has allowed claims 1-11. Claims 12 and 13 depend on claim 1. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In Re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir.

1988); MPEP 2143.03. It is believed the rejection is overcome. Applicants therefore respectfully request Examiner withdraw the rejection to claims 12 and 13.

Regarding claims 14-20, Examiner has indicated,

Applicant argues that the adhesive in Budd is added in a liquid state while the adhesive in the present invention is applied in a dry state. Applicant argues the various advantages of using a dry adhesive in terms of the process energy saved by his process. This argument has been considered but is not persuasive because the claims are directed towards a product and not to the method of making the product.

Applicant argues that one of ordinary skill in the art would not expect to use a topping of the size set forth in the claims. But no unobvious or unexpected difference is seen from the size of the toppings in Budd and the size of the toppings of the claims. The low range of 1.7mm appears to examiner to be about the size of peppercorn. Applicant urges that examiner has not proven that the toppings and substrate of Budd would necessarily have a low water activity. The water activity of the binder is disclosed at column 2, line 43 to have a low water activity. Further it is very well known in the art that dried foods have low water activity. Since the Patent Office does not have the facilities for examining and comparing applicant's seasoning bits with the Budds savory snack foods, the burden is upon applicants to show an unobvious distinction between the material structural and functional characteristics of the claimed savory snack foods of the prior art. See *In Re Best*, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and *In Re Fitzgerald et al.*, 205 USPQ 594.

Applicant appreciates the additional opportunity to better explain why the claimed invention is unobvious in view of Budd. The omission of an element and retention of its function is an indicia of unobviousness. MPEP 2144.04. The *Budd* reference is directed towards a sugar-based binder for use in savory foods. The Budd reference therefore requires "an effective amount of sweetness suppressor" to suppress some or all of the sweet taste of the binder composition. See Col. 2, Ins. 34-35 and Col. 2, Ins. 10-14. The present invention requires no such sweetness suppressor. It is believed the rejection is overcome. Applicant respectfully requests the rejection to claims 14-20 be withdrawn.

Further, the size of the claimed toppings is not suggested by *Budd*. For example, in the last paragraph of page 4 of the patent application, the applicants discuss, among other things, the desire for a snack food to emulate a topped food product with large flavoring bits that is highly resistant to separation. Thus, although not explicitly disclosed by the patent application, one could reasonably

infer a snack product that may emulate a tostada or a pizza. The *Budd* reference on the other hand is replete with references to powdery and particulate toppings. For example, *Budd* teaches,

“A mixture of particulate toppings (4 g dried green onion flakes), 7 g dried bacon bits and 1 g dried green onion flakes) was sprinkled onto the binder-treated chips. The chips were then placed in a forced air oven at 105 C. for 2 minutes to cause the Maltrin® to dissolve and to effect fusion of the binder with the particulates.

(Col. 3, lns. 46-48) (emphasis added).

Examiner indicates that the low range of 1.7mm appears to the Examiner to be about the size of peppercorn, however, the word “peppercorn” appears nowhere in the *Budd* reference. In fact, *Budd* not only fails to teach peppercorn, but teaches away from using peppercorn. *Budd* discloses, “coarse and fine ground salt, pepper, seasoning powders . . . and . . . cheese powders.” (col. 1, lns. 61-64) (emphasis added). It is clear that when the *Budd* reference is taken as a whole, that *Budd* does not teach or suggest the claimed limitation of “an adhesive-bit mix wherein said bits are substantially between 1.7 to 17 mm in diameter.” It is believed the rejection is overcome. Applicant respectfully requests the rejection to claims 14-20 be withdrawn.

Regarding claims 18-20, it is well established that as a part Examiner’s burden to establish a *prima facie* case of obviousness, Examiner is required to show that the referenced teachings “appear to have suggested the claim subject matter.” *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143, 147 (C.C.P.A. 1976). Applicant pointed out that the rejection of claims 18-20 in the previous response were not supported by any explanation or citation to any reference and the applicants invited the Examiner to either withdraw the rejection of claims or provide a specific citation to a reference disclosing the claimed invention. Examiner has not established a *prima facie* case of obviousness, and the rejection of claims 18-20 should be withdrawn. Consequently, Applicant respectfully requests the rejection to claims 18-20 be withdrawn.

**CONCLUSION**

It is respectfully urged that the subject application is patentable over references cited by Examiner and is now in condition for allowance. Applicant requests consideration of the application and allowance of the claims. If there are any outstanding issues that the Examiner feels may be resolved by way of a telephone conference, the Examiner is cordially invited to contact Chad E. Walter at 972.367.2001.

The Commissioner is hereby authorized to charge any additional payments that may be due for additional claims to Deposit Account 50-0392.

Respectfully submitted,

By:   
Chad E. Walter  
Registration No. 54,625  
Attorney for Applicants

Date: 11-7-05

CARSTENS & CAHOON, LLP  
P.O. Box 802334  
Dallas, TX 75380  
(972) 367-2001 *Telephone*  
(972) 367-2002 *Facsimile*